No. 3612

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

H. C. ANDERSON,

Appellant,

vs.

O. H. AVEY and PAYETTE VALLEY LAND & ORCHARD COMPANY, LIMITED, a Corporation,

Appellees.

BRIEF OF APPELLEE O. H. AVEY

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

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RICHARDS & HAGA,
Residence, Boise, Idaho,
Solicitors for Appellee O. H. Avey.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

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STATEMENT

This is an equity action brought by appellant, a stockholder of appellee, Payette Valley Land and Orchard Company, Limited, a corporation, on behalf of and for the benefit of such corporation, against appellee, O. H. Avey, who is also a stockholder of the corporation, to recover the sum of eighteen thousand seven hundred ($18,700) dollars, being the aggregate of ten thousand ($10,000) dollars representing the par value of one hundred shares of stock alleged (Transcript, pp. 10 and 11) to have

been issued to appellee in payment for property received by the corporation, and eight thousand seven hundred ($8,700) dollars, being seventy-five ($75) dollars per share for 116 shares of stock alleged (Tr., pp. 11 and 12) to have been issued and sold to appellee Avey for twenty-five ($25) dollars per share when the par value was one hundred ($100) dollars per share.

The allegations of the complaint are set forth at some length in appellant's brief and with substantial correctness. It is alleged that the corporation was organized on or about April 19, 1910 (Tr., p. 8); that 1,428 shares of stock in the corporation of the par value of one hundred ($100) dollars per share have been issued (Tr., p. 10), of which appellant "now and for a long time past has been the owner and record holder of 304 shares" (Tr., p. 9). It is further alleged that 700 of the 1,428 shares were issued on or about February 21, 1910, to appellee and certain other persons constituting the board of directors of the corporation as fully paid up in return for an option on certain real estate "which was not of the value of said shares of stock so issued, to-wit: $70,000, or any value at all to said corporation" (Tr., p. 11), and that such action was taken by order of the board of directors and without the knowledge or consent of plaintiff. It is further alleged in the same paragraph that between March 21st, 1912, and September 21st, 1915, 662 shares of the stock were issued by authority of the board of directors and without the knowledge or consent of plaintiff to the

members of such board as fully paid up shares, when only twenty-five cents on each dollar of the par valuation had been paid, and that subsequently 28 shares were issued for a similar consideration. This leaves only 38 shares of stock of the corporation unaccounted for, and necessarily, therefore, a large part of the 304 shares of stock owned by appellant must be either a part of the 700 shares issued for property or a part of the stock issued at twenty-five ($25) per share or both. If any portion of this 38 shares was paid for in full in money or property and appellant holds even one share of such stock, it was incumbent upon him to allege such facts and show that part at least of the stock owned by him and upon which he bases his right of action was issued for its full par value in money or property. As a matter of fact, it appeared from the testimony of appellant himself, introduced subject to a reserved ruling (Tr., p. 30) that all his stock was issued in one or the other of the transactions complained of and apparently the allegation of paragraph 2 to the effect that plaintiff "now and at all times when the acts herein complained of were committed was a stockholder in the defendant, Payette Valley Land and Orchard Company, a corporation" is merely colorable in an attempt to comply with general equity Rule 27.

The complaint further alleges that appellee Avey holds 100 shares of the stock issued for property and 116 shares of the stock sold at twenty-five ($25) dollars per share, and hence, he and appellant are in exactly the same position upon the question of

their stock being fully paid for, and yet the bill contains no offer on the part of complainant to do equity as regards the balance that would be unpaid upon his own stock if there is a balance due on that of appellee. Nor does he allege that a single share of his own stock was issued for full value in money or property.

The case is here on appeal from a judgment of dismissal, the learned Trial Court having sustained appellees' objection to the evidence on the ground that the bill did not state facts sufficient to constitute a cause of action. The questions presented for determination are, therefore, whether upon the allegations of the bill appellant can recover from appellee Avey for the benefit of the corporation, first, for the par value of the 100 shares issued for property received by the company and valued by its board of directors at the par value of the stock, and second, for the difference between the par value of the 116 shares sold to appellee Avey and the amount actually paid for them by the latter, which difference is alleged to have been seventy-five dollars per share or eight thousand seven hundred dollars.

The allegations of Paragraphs IX and X of the Bill (Tr., pp. 12 and 13) may be disregarded, we think, for the reason that it appears that the loan referred to in Paragraph IX was repaid and the proposed assessment alleged in Paragraph X was canceled. Neither allegation shows any injury to appellant or to the corporation, and no relief is sought upon either allegation, and neither of these

alleged transactions are connected in any way with the transactions which are the basis of the complaint.

BRIEF OF THE ARGUMENT

A cause of action comprises every fact necessary to the relief prayed for.

McAndrews vs. Chicago etc. Co., 162 Fed. 856, 89 C. C. A. 546.

Mercantile T. & D. Co. vs. Roanoke etc. Co., 109 Fed. 3.

Matz vs. Chicago etc. Co., 85 Fed. 180.

Billing vs. Gilmer, 60 Fed. 332, 8 C. C. A. 645.

The statutes of Idaho authorize a corporation to issue stock as full paid for property, and when a corporation makes such issue, the judgment of the directors of the corporation as to the value of such property, in the absence of fraud, is made conclusive.

Sec. 4728, Compiled Statutes of Idaho.

Sec. 4752, Compiled Statutes of Idaho.

Old Dominion Copper etc. Co. vs. Lewisohn, 210 U. S. 206, 52 L. Ed. 1025.

Walburn vs. Chenault, 23 Pac. 657, 43 Kan. 352.

Eggleston vs. Pantages, 160 Pac. 425, 428, 93 Wash. 220.

Foster vs. Seymour, 23 Fed. 65.

Where a corporation issues fully paid stock in return for property conveyed, neither the corpora-

tion nor its shareholders have a right of action against the shareholders receiving such stock in the absence of actual fraud.

Sec. 4728, Idaho Compiled Statutes.

Cunningham vs. Holley etc. Co., 58 C. C. A. 140, 121 Fed. 720.

Coit, Admr., vs. North Carolina Co., 119 U. S. 343, 30 L. Ed. 420.

Walburn vs. Chenault, *supra.*

Krisch vs. Interstate Fisheries Co., 81 Pac. (Wash.) 855.

Eggleston vs. Pantages, *supra.*

Inland Nursery etc. Co. vs. Rice, 57 Wash. 67, 106 Pac. 499.

Clinton M. & M. Co. vs. Jamison, 256 Fed. 577.

Northern Trust Co. vs. Columbia etc. Co., 75 Fed. 936.

Foster vs. Seymour, 23 Fed. 65.

14 Corpus Juris, pp. 458-459.

O'Dea vs. Hollywood Cemetery Co., 145 Cal. 53, 97 Pac. 1.

Even the right of creditors to attack such action seems to be based upon fraud.

Sec. 4728, Idaho Compiled Statutes.

Cunningham vs. Holly etc. Co., *supra.*

Where a corporation issues stock at less than par, creditors who have reduced their claims to judgment and exhausted their legal remedies against the corporation may maintain an action to compel the

holders of such stock to pay the difference between its cost and par, but this remedy is not available to the corporation.

Sec. 4728, Idaho Compiled Statutes.

Feehan vs. Kendrick, 32 Ida. 220, 179 Pac. 507.

5 Fletcher Cyclopedia Corporations, p. 5899.

Scoville vs. Thayer, 105 U. S. 143, 26 L. Ed. 968.

Dickerman vs. Northern Trust Co., 176 U. S. 181, 44 L. Ed. 823.

There is no Idaho statute prohibiting a corporation from issuing its shares at less than par, and the appellee corporation having consented to the alleged issue at less than par, has no right of action by reason thereof.

Courtney vs. Georger, 221 Fed. 502.

Courtney vs. Georger, 228 Fed. 859, 143 C. C. A. 257.

In re Huffman—Salvor Roofing Paint Co., 234 Fed. 798.

Kimbell vs. Chicago etc. Co., 119 Fed. 102, 106, 55 C. C. A. 162.

Writ of certiorari denied, 189 U. S. 512, 47 L. Ed. 924.

Dickerman vs. Northern Trust Co., 176 U. S. 181, 44 L. Ed. 423, 429.

O'Dea vs. Hollywood Cemetery Ass'n, 97 Pac. (Cal.) 1, 6.

In re Jassoy Co., 101 C. C. A. 641, 178 Fed. 515.

Smith vs. Martin, 135 Cal. 247, 67 Pac. 779.
California Trona Co. vs. Wilkerson, 20 Cal. App. 694, 130 Pac. 190.

An Idaho corporation can only collect calls on assessments in accordance with the statutes and cannot waive its right to proceed against the stock and sue the stockholder personally until the assessment has gone delinquent.

Secs. 4733-4738, Idaho Compiled Statutes.
Sec. 4751, Idaho Compiled Statutes.
Wall vs. Basin Mining Co., 16 Ida. 313, 101 Pac. 733.

It could not sue part of the stockholders or assess them only and the total of the liability would have to be ascertained.

Hunt vs. Sharkey, 20 Cal. App. 690, 130 Pac. 21.

The doctrine that the unpaid portion of the subscribed capital stock of a corporation constitutes a trust fund for creditors is only available to judgment creditors and a mere stockholder cannot maintain an action to enforce collection of such unpaid portion on general allegations that the corporate assets are insufficient to pay creditors.

Merchants Agency vs. Davidson, 23 Cal. App. 274, 137 Pac. 1091.
Hospes vs. Northwestern Mfg. Co., 48 Minn. 197, 50 N. W. 1117.
Courtney vs. Georger, 143 C. C. A. 257, 228 Fed. 859.

Feehan vs. Kendrick, 32 Ida. 220, 179 Pac. 507.

Jensen vs. Aikman, 32 Ida. 261, 181 Pac. 525.

Participating or a s s e n t i n g stockholders are estopped to object to an issue of stock as fully paid when it was not so in fact.

5 Fletcher Cyc. Corps., p. 5913.

Cunningham vs. Holley etc. Co., 58 C. C. A. 140, 121 Fed. 720.

Re Charles Town Light & Water Power Co., 199 Fed. 846.

Washburn vs. Nat'l Wall Paper Co., 26 C. C. A. 312, 81 Fed. 17.

Green vs. Abietine Co., 96 Cal. 322, 31 Pac. 100.

Eggleston vs. Pantages, 93 Wash. 221, 160 Pac. 425.

Failure to object within a reasonable time is equivalent to express assent.

Taylor vs. Ry. Co., 13 Fed. 152.

Kent vs. Quicksilver M. Co., 78 N. Y. 159-191.

Transferees of such stock are bound as well as the original holder because stock certificates are not negotiable and pass subject to all equities.

5 Fletcher Cyc. Corporation, p. 5915.

Church vs. Citizens' St. R. Co., 78 Fed. 526.

Brown vs. Duluth etc. Ry. Co., 53 Fed. 889.

As this action would be barred under the Idaho Statute of Limitations, it was incumbent upon appel-

lant to excuse himself from the imputation of *laches* in his complaint, and having failed to do so, the bill does not state a cause of action.

Secs. 6607, 6610, I. C. S.

21 Corpus Juris 401.

Smith vs. Smith (C. C. A., 9th Circuit), 224 Fed. 21.

Kelly vs. Boettcher, 29 C. C. A. 14, 85 Fed. 55.

Newberry vs. Wilkinson, 118 C. C. A. 111, 199 Fed. 673.

Mackall vs. Casilear, 137 U. S. 556, 34 L. Ed. 776.

Wyman vs. Bowman, 62 C. C. A. 169, 127 Fed. 257.

Badger vs. Badger, 2 Wall. 95, 17 L. Ed. 338.

Richards vs. Mackall, 124 U. S. 183, 31 L. Ed. 396.

ARGUMENT

The Trial Court having ruled that the complaint did not state facts sufficient to constitute a cause of action, we must first consider what a cause of action is. In Matz vs. Chicago & A. R. Co., 85 Fed. 180, and on 187, the Court states:

> "The Century Dictionary defines a cause of action to be 'the situation or state of facts which entitles a party to sustain an action'."

In Billing vs. Gilmer, 8 C. C. A. 645, 60 Fed. 332, and on page 334, it is stated:

> "What is a cause of action? As defined by one of the learned counsel for appellee: 'A cause

of action is the existence of those facts which give a party a right to judicial interference in his behalf'."

In Mercantile Trust & Dep. Co. vs. Roanoke etc. Co., 109 Fed. 3, and on page 8, the Court states:

> "The ground or cause of action is of first importance, and this has been defined to be 'the ground on which an action can be maintained'. Black, Law Dict., p. 182. 'It is composed of the right of the plaintiff, and the obligation, debt, or wrong of the defendant. This combination, it is sufficiently accurate to say, constitutes the cause of action'."

In McAndrews vs. Chicago etc. Co., 89 C. C. A. 546, 162 Fed. 856, and on page 858, it is stated:

> "The phrase 'cause of action' comprises every fact necessary to the right to the relief prayed for."

In view of these authorities we submit that in order to state a cause of action appellant must allege the existence of a state of facts that will entitle him to the relief prayed for. He is suing according to his own allegation (Tr., p. 27) "in the name of and for the benefit of the corporation" (Payette Valley Land and Orchard Company) and he must not only show that the corporation would be entitled to such relief but also that he is entitled to such relief when suing for the benefit of the corporation. Certainly then, he cannot occupy any better position than the

corporation in whose name he professes to sue and which answered denying many of his material allegations, and he is bound by the same limitations and restrictions that would bind the corporation if it brought the action. We shall show later on in the brief that the doctrines of estoppel and laches will bar plaintiff, even though they might not operate to the same extent against the corporation, but we will first discuss the question whether the corporation would have a right of action upon either of the transactions complained of.

NO LIABILITY ON STOCK ISSUED FOR PROPERTY

We have quoted at length in the appendix the provisions of the Idaho constitution and statutes bearing upon stock and stockholders and will only refer to the most important of them here. Section 4728 of the Idaho Compiled Statutes, among other things, declares:

> "No corporation shall issue any stock as paid up in whole or in part * * * except for money, property, labor or services actually received by the corporation."

This clearly authorizes such corporation to issue its stock for property received.

Section 4752, Idaho Compiled Statutes, in subsection 9, declares:

> "When a corporation shall issue stock or bonds for labor done, services performed or property actually received, the judgment of the

directors of such corporation as to the value of such labor, services or property shall, in the absence of fraud in the transaction, be conclusive."

It is alleged in Paragraph VIII of the complaint (Tr., pp. 10 and 11) as follows:

"That on or about the 21st day of February, 1910, and in violation of said by-laws, 100 shares of stock in said defendant corporation of the par value of $100.00 per share were issued by order of the directors of said corporation and a majority of the board of directors thereof, and without the knowledge or consent of plaintiff, to each of the following persons, to-wit: O. H. Avey, A. P. Scritchfield, M. F. Albert, J. W. Roberts, L. V. Patch, Otto C. Miller and R. E. Haynes, who at said time constituted the board of directors of said corporation, said stock being issued as fully paid up; that the issuance of each 100 shares purported to be in consideration of a one-seventh equity in certain land consisting of about 240 acres, situated in Canyon County, Idaho; that said defendants nor neither of them had any equity in said lands or any part thereof, except an option to purchase the same, which said option or interest was not of the value of said shares of stock so issued, to-wit: $70,000 or any value at all to said corporation. That this plaintiff is reliably informed and *varily* believes and upon information and belief alleges the fact to be that there was no real or valuable

> consideration for the issuance of said 700 shares of stock in said defendant corporation, and that no part of the face or par value of said stock has ever been paid, of all of which said directors had knowledge."

It accordingly appears that this stock was issued after the board of directors had determined the value of the property, and for all that appears in the complaint, these directors at this time, which according to the allegations was before the corporation was actually organized, owned all the stock of the corporation, hence, the case presents the identical situation that was presented in the much litigated case of Old Dominion Copper Company vs. Lewisohn, 210 U. S. 206, 52 L. Ed. 1025, where the Court at page 1029 (210 U. S., page 212) said:

> "At the time of the sale to the plaintiff, then, there was no wrong done to anyone. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. Salomon vs. A. Salomon & Co. (1897), A. C. 22; Blum vs. Whitney, 185 N. Y. 232, 77 N. E. 1159; Tompkins vs. Sperry, 96 Md. 560, 54 Atl. 254."

This corporation having so issued its shares in the absence of any allegation of fraud in the transaction is prohibited from a recovery therefor in this action.

It is possible that under the allegations of the bill, appellee would be liable to creditors, as declared in said Section 4728, which provides:

> "Each stockholder of a corporation is individually and personally liable for its debts and liabilities to tne full amount unpaid upon the balance or face value of the stock or shares owned by him.
>
> "Any creditor of the corporation may institute actions against any of its stockholders jointly or severally, and in such action the Court must determine the amount unpaid upon the stock held or owned by each defendant and a several judgment must be entered against him for a sum not exceeding such amount."

However, no creditor is here complaining, but the plaintiff is seeking to recover on behalf of the corporation for its use and benefit. We contend that under the pleadings and law that this appellee corporation is without right of action on the facts alleged. Light is thrown on this question by a statement of this Court in the case of Cunningham vs. Holley, Mason, Marks & Co., 58 C. C. A. 140, 121 Fed. 720, where on page 721 Justice Gilbert in discussing this question states:

> "There is in Washington no statutory prohibition against the payment of stock subscriptions by the transfer of property to the corporation in the place of cash. * * * When stock is so paid for and property is so taken in pay-

> ment, it is the general rule that the transaction cannot be impeached, even at the suit of a creditor of the corporation, except for fraud. 'Where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account'."

And there is no pretense here of even an attempt to allege fraud in this transaction. The foregoing declaration of the rule of law as applicable here is emphasized by the statement of the Supreme Court of the United States in Coit vs. North Carolina etc. Co., 119 U. S. 343, 30 L. Ed. 420.

As above shown the statute specifically gives a creditor of the corporation the right to institute an action against a stockholder for the difference between the par value and the amount paid by him, but does not give such right to the corporation itself in the absence of fraud on the corporation. The actual value of the stock alleged to have been issued for the property, so far as the allegations of the complaint are concerned, was purely nominal and so far as the allegations of the complaint show, the parties to whom such stock was issued were all the stockholders at that time unless by inference the plaintiff himself was then the holder of a portion of the 38 shares unaccounted for by the complaint; and this transaction, according to the allegations of the complaint, occurred about two months before the corporation itself was organized, in February, 1910,

or about eight years prior to filing the complaint, and the plaintiff has stood by all these years and made no objection or complaint until the filing of this action.

A statement made by the Court in the case of Walburn vs. Chenault, 43 Kan. 352, 23 Pac. 657, and on page 660, sheds some light on such a transaction:

> "Although the amount of stock issued for the purchase of the property was large, it had only a nominal value, and it was delivered and treated by all parties as full paid. The fact that the property was overvalued will not, in the absence of fraud, create a liability against the stockholders."

If that rule is correct as applied to the case at bar, then the plaintiff has not stated facts sufficient to constitute a cause of action so far as the transfer of such stock in consideration of such property was concerned.

While this rule might not apply so far as creditors were concerned, no creditor is here complaining. In Kirsch vs. Interstate Fisheries Co., 81 Pac. (Wash.) 855, and on page 856, it is stated:

> "Whatever the rights of the creditors might be, as between the corporation and the subscribers, this stock was fully paid up, and the corporation will not be heard to gainsay it. The corporation lawfully became the owner of this stock, and had a right to sell or reissue it. Furthermore, after receiving the benefits of the sale of the stock, the defense of *ultra vires* is not available."

This corporation received the benefit of this sale about eleven years ago and the charge of *ultra vires* according to the rule above mentioned cannot prevail. This contention is emphasized by a ruling of the Court in Eggleston vs. Pantages, 93 Wash. 221, 160 Pac. 425, where on page 428 the Court states:

> "The doctrine that the capital stock of the corporation is a trust fund for the creditors and that all stock must be paid for in money or money's worth * * * in the absence of fraud or misrepresentation, has no application as between the stockholders themselves where the rights of the creditors are not involved."

In Inland Nursery & Floral Co. vs. Rice, 57 Wash. 67, 106 Pac. 499, and on page 500, the Court states:

> "It is well established that a corporation issuing stock as fully paid by a transfer of property cannot thereafter treat it as partly paid; and, upon the same reasoning, it is held that, in the absence of actual fraud, a corporation cannot maintain an action to cancel shares of stock issued in exchange for property upon the ground that the property was not actually worth the valuation placed upon it. Iowa Drug Co. vs. Souers, 139 Iowa, 72, 117 N. W. 300, 19 L. R. A. (N. S.) 115, and cases cited in note. The appellant here, having placed its own valuation on the property at the time of the transfer for its stock, cannot now complain upon the ground of an overvaluation. 'Whatever may have been

in fact the value of the property turned over to the company for its stock, the company agreed to take it for the stock. The persons interested were the stockholders, and there was no dissent on the part of any person concerned from what was then done. *Neither any person then holding stock nor any person who afterwards became a stockholder by assignment from one who then held stock can now make complaint on behalf of the corporation as against the fairness of that transaction.* This I take it to be the settled law on that subject'." (Our italics.)

Clinton M. & M. Co. vs. Jamison, 256 Fed. 577.

Northern Tr. Co. vs. Columbia etc Co., 75 Fed. 936.

There is a case somewhat similar reported in the 23d Federal—Foster vs. Seymour, page 65—where it appears that the statute as in the case at bar authorized the issue of shares as full paid for property, and on page 66 the Court states:

"The statute under which the company was incorporated authorizes the trustees to issue stock and exchange it for property, and declares that when exchanged such stock shall be taken to be full-paid stock, and not liable to further calls. * * * The statute, however, permits the trustees to exchange stock to the amount only of the value of the property for which it is exchanged. Upon these facts the corporation

has no right of action against the trustee. The corporation has lost nothing by the transaction disclosed by the bill, except the paper which was created and called capital stock. None of its capital was diverted. The scrip was not capital stock. The capital stock of a corporation is the money or property which is put into a corporate fund by those who subscribe for stock, and thereby agree to become members of the corporate body. Unless it represents capital contributed, or agreed to be paid in, it has no value. * * * The property it received in exchange for the scrip had some value; certainly as much as the scrip had. There was no fraud upon the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there was of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. * * * The remedy of complainant if he has been deceived into purchasing stock in this corporation by false representations as to its value is against those who have misled him. Even if he could recover against the corporation or against the trustees, the corporation has no cause of action against the trustees."

In the case last quoted from the suit was by a stockholder for the benefit of the corporation, hence the question of pleading was exactly the same as in the case at bar and a general demurrer to the bill was sustained.

In 14 Corpus Juris, Section 648, pages 458 and 459, the rule is thus laid down:

> "In the absence of constitutional, statutory, or charter provisions to the contrary, an agreement by which a corporation issues stock for property, labor, or services, is binding, unless rescinded for frauds on the corporation and on the participating or consenting stockholders, irrespective of the actual value of the property, labor, or services, as compared with the par value of the stock, no rights of dissenting stockholders or creditors being involved; and it is held that the corporation and participating or assenting stockholders and their transferees are bound by the agreed fictitious valuation, even when there is a constitutional or statutory prohibition against a fictitious issue or increase of stock, or issue for less than par." (Citing numerous cases.)

In O'Dea vs. Hollywood C. Co., 145 Cal. 53, 97 Pac. 1, and on page 6, the Court states:

> "Directors of a corporation have a right to issue stock as fully paid up, upon such terms and at such price as they see fit, and in the absence of fraud, as far as the stockholders or their assignees are concerned, the action of the directors in issuing it is final, and the action of the corporation cannot be attacked by the stockholders, or the validity of the issue assailed on the ground, merely, that the consideration was inadequate for which the corporation issued it

as fully paid up. Creditors may attack the transaction; stockholders cannot." (Citing cases.)

In the light of these authorities, how can it be possible that where, as here, no fraud is alleged and no creditor is complaining, the appellee corporation through a stockholder can now repudiate the action of its board of directors in valuing the property at $70,000 and issuing fully paid stock of the par value of $70,000 for such property and then recover the full par value of such stock, especially under a statute which says specifically that the judgment of the directors shall be conclusive in the absence of fraud? To ask this question is to answer it, and it necessarily follows that no cause of action could be stated by the corporation resting upon such facts, and that appellant suing in the right of the corporation stands in no better position and has not stated a cause of action upon the issuance of this 700 shares of stock for the property.

NO LIABILITY FOR STOCK ACQUIRED AT LESS THAN PAR

The second transaction complained of in the complaint is the alleged issuance of 116 shares of full paid stock to appellee Avey for one-fourth of their par value, which is alleged to have been done by order of the board of directors.

Section 4728 of the Idaho Compiled Statutes of 1919 contains the following provision in relation to this matter:

"Each stockholder of a corporation is individually and personally liable for its debts and liabilities to the full amount unpaid upon the par or face value of the stock or shares owned by him.

"Any creditor of the corporation may institute actions against any of its stockholders jointly or severally, and in such action the Court must determine the amount unpaid upon the stock held or owned by each defendant, and a several judgment must be entered against him for a sum not exceeding such amount.

"Nothing in this title must be construed to render any stockholder individually or personally liable, as such stockholder, for debts or liabilities of the corporation, either at the suit of a creditor or for assessments or calls, to an amount exceeding the balance unpaid upon his stock or the difference between the amount that has been actually paid upon his stock and the par or face value thereof, except when so liable on the ground of fraud or misrepresentation, or concealment, or for neglect or misconduct as an officer, agent, stockholder or member of the corporation."

This statute merely recognizes a right generally accorded to corporate creditors who have exhausted their legal remedies against the corporation, but it does not give the corporation itself or a stockholder suing in its behalf power to repudiate its agreement that stock issued at less than par shall be fully paid.

The Supreme Court of Idaho has construed this statute in the recent case of Feehan vs. Kendrick, 179 Pac. 507, 32 Ida. 220, where after quoting the statute the Court says at page 223:

> "By this statute no new liability of the stockholder is created, but an old one is recognized and made available to corporate creditors (citing cases).
>
> "At common law a stockholder was, to the extent of the amount unpaid on his stock, liable for the corporate indebtedness (7 R. C. L., p. 356), such liability being enforced in equity either through the corporation, represented by an assignee or a receiver, or by the creditors individually. (*Holmes vs. Sherwood*, 16 Fed. 725.) By the provisions of the section last above quoted, a stockholder's liability, as at common law, is still for the corporate indebtedness only, and the extent thereof is still measured by the amount unpaid upon his stock."

And on pages 225 and 226 the Court further states:

> "When a subscription to capital stock is made and the stock is issued and not paid for in full, the corporation may place itself in position whereby it cannot recover further payments from the subscriber. However, its creditors may exact payment of any remaining balance upon the subscription in order that his debt due from it may be paid. This liability is recog-

> nized at common law and by statute. The most that can be said for the statute is that it declares a well-settled and familiar principle of the common law which recognizes the contractual obligation the subscriber and his assignee, who has purchased stock with notice that it has not been paid for, owe to pay the subscription price. which obligation may be enforced by, or on behalf of, a creditor of the corporation."

This is an interpretation of this statute by the highest Court of the State. This shows that the plaintiff on behalf of the appellee corporation has not stated a cause of action in this respect, for there being no statute prohibiting appellee corporation from issuing its shares at less than par, and in the absence of fraud, having done so, it is conclusive against the corporation and does not give it a cause of action against the purchaser of such shares.

This being a question of the construction of an Idaho Statute, the Federal Courts should follow the doctrine announced by the highest Court of the State.

> Cunningham vs. Holly, etc. Co., 58 C. C. A. 140, 121 Fed. 720.
>
> Re Jassoy Company, 101 C. C. A. 641, 178 Fed. 515.
>
> Courtney vs. Georger, 143 C. C. A. 257, 228 Fed. 859.

The general rule upon this question is in accordance with the doctrine of the Idaho Supreme Court,

as appears from 5 Fletcher Cyclopedia Corporations, page 5899, where it is stated:

> "It is undoubtedly true, however, as was stated in a former section, that where a corporation issues watered or fictitiously paid up stock, with the consent of all the stockholders, and when there is no charter, statutory or constitutional provision rendering the transaction void, the agreement is valid and binding as against the corporation, and it cannot afterwards repudiate the same and exclude the holders of the stock, or compel them to pay the difference between the par value of the stock and what has been paid or agreed upon as full payment."

Numerous cases from many jurisdictions are cited in support of this doctrine.

In Scoville vs. Thayer, 105 U. S. 143, 26 L. Ed. 968, and on page 973, the Court states:

> "The stock held by the defendant in error was evidenced by certificates of full paid shares. It is conceded to have been the contract between him and the Company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the Company this was a perfectly valid agreement. It was not forbidden by the charter of the Company or by any law or public policy, and as between the Company and its stockholders was just as bind-

ing as if it had been expressly authorized by the charter.

"If the Company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied 'by discount', according to their contract, the stockholders could have successfully resisted such a demand. No suit could have been maintained by the Company to collect the unpaid stock for such a purpose. The shares were issued as fully paid, on a fair understanding, and that bound the Company."

This declaration was approved in Dickerman vs. Northern Trust Company, 176 U. S. 181, 44 L. Ed. 423, and on 434, where the Court quotes the above declaration, and then on page 435, where the Court declares:

"There is no doubt that, if this were a suit by creditors to enforce payment of the unpaid portion of the stock subscription, the fact that the stock certificates declared that they were fully paid and unassessable would be no defense; but it is a suit of stockholders in the right of the corporation, and as between the corporation and its stockholders, the declaration that the shares are fully paid up and unassessable is a valid one."

The decisions in the Wisconsin cases cited by appellant at page 22 of his brief were based partly on allegations of fraud and partly on different statutory

provisions, and as appears from the foregoing, unless distinguished upon this ground they are contrary to the general rule and should be disregarded, in view of the clear statement of the Idaho Supreme Court on the question.

In re Jassoy Co., 101 C. C. A. 641, 178 Fed. 515, where it appears that the statute of New York was substantially like the Idaho statute above quoted, the holding of the New York Court in construing said statute is set forth on page 517 in the following words:

> "The liability does not exist in favor of the corporation itself, nor for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions."

And see Courtney vs. Georger, 221 Fed 502, where the Court, on page 505, quotes the ruling in the case of In re Jassoy above mentioned with approval. This case was affirmed on appeal, 143 C. C. A. 257, 228 Fed. 859.

See also In re Huffman-Salvor Roofing Co., 234 Fed. 798.

The California Courts on constitutional provisions similar to those in Idaho have held clearly that neither the corporation nor its stockholders can assail stock issued as fully paid for less than the par value of the stock. See:

Smith vs. Martin, 135 Cal. 247, 67 Pac. 779.

California Trona Co. vs. Wilkinson, 20 Cal. App. 694, 130 Pac. 190.

APPELLANT NOT ENTITLED TO RECOVER ON SUBSCRIPTION OR TRUST FUND THEORY

The first point argued in appellant's brief is thus stated at page 14: "Under the Idaho statutes appellee Avey owed to the corporation in the nature of an express subscription the amount of the par value unpaid upon the stock issued to him." The second point, found at page 18, is: "Avey's acceptance of the stock raised an implied promise to pay the par value thereof."

The argument on these points is founded chiefly upon the Idaho statutes and is applied both to the stock issued for property and the stock alleged to have been issued at less than par, but the cases cited are either actions by creditors or by receivers representing creditors, or else are actions based on actual fraud, and none of them can have any application here. As we have shown above, the agreement of the corporation through its board of directors that the stock should be fully paid in the case of each of the transactions complained of was binding upon the corporation and stockholders suing in its right. But even if we accept appellant's theory that there is an express or implied subscription enforcible by the corporation to recover the balance unpaid, nevertheless the corporation could only enforce this liability by proceeding in accordance with Sections 4733-4751, inclusive, Idaho Compiled Statutes, quoted at length in the appendix, relating to assessments and calls. Section 4733, quoted by appellant, provides that the directors may levy and collect assessments "in the

manner and form, and to the extent, herein provided". The board would accordingly have to levy an assessment or call upon all the outstanding stock upon which any portion was unpaid in accordance with Sections 4733-4736, and would have to publish and mail notice of such assessment, as provided in Sections 4737 and 4738. It certainly could not single out one or two stockholders as appellant has done and charge them with the whole liability, allowing the others to escape scot-free, before the total amount required to be paid creditors was ascertained.

Hunt vs. Sharkey, 20 Cal. App. 690, 130 Pac. 21.

Besides, Section 4751 limits a personal action against a stockholder for calls by the corporation by providing that:

> "*On the day specified for declaring the stock delinquent or at any time subsequent thereto and before the sale*, the board of directors may elect to waive further proceedings by sale, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part thereof."

In Wall vs. Basin Mining Co., 16 Ida. 313, 101 Pac. 733, the Court points out that in the statute the words "assessment", "call" and "installment" are used interchangeably and holds that by issuing its stock as fully paid and non-assessable a corporation may debar itself from levying assessments. This case certainly cannot support appellant's position

here, but it does show that he is seeking to enforce a call in the right of the corporation, and that such corporation could not charge appellee with a personal liability until the conditions precedent contained in Sections 4733-4751 had been complied with. Accordingly, the assumption of appellant stated on page 18 that "it needs no argument to reach the one conclusion that the corporation is entitled to recover on this subscription" cannot be accepted at its face value.

At page 23 of appellant's brief a further proposition is advanced as follows:

> "The capital of a corporation is a trust fund for creditors and stockholders and if some stockholders have not paid par value for the stock, the corporation as trustee may collect the unpaid part, particularly when the corporation requires such fund to continue business, pay creditors and prevent an assessment against the stock of an innocent stockholder."

This argument can lead nowhere in this case because appellant is not an innocent stockholder. As pointed out heretofore the bill does not allege that a single share of appellant's stock was actually paid for in full or that he is in any sense an innocent stockholder. He claims to own 304 shares of stock and by his own allegations there could not possibly be but 38 shares of the entire capital stock of the company that were not issued for twenty-five cents on the dollar or for property which he claims was

of no value. He does not allege that the remaining 38 shares were actually paid for in full or that he owns any portion of such shares. Besides if appellant was an innocent stockholder he would not be personally liable for calls and he would have ample opportunity to defend, if his stock was sought to be taken by assessment.

Feehan vs. Kendrick, 32 Ida. 220, 179 Pac. 507.

The trust fund doctrine relied upon by appellant has been upheld by the Courts for the purpose of protecting creditors, and even to that extent it has been severely criticised by many learned Courts. See:

Hospes vs. Northwestern Mfg. Co., 48 Minn. 197, 50 N. W. 1117.

Courtney vs. Georger, 143 C. C. A. 257, 228 Fed. 859.

Re Jassoy Co., 101 C. C. A. 641, 178 Fed. 515.

It is universally held, both at common law and under statutes similar to the Idaho statute, that a creditor, in order to enforce this doctrine, must first have reduced his claim to judgment and must have exhausted his legal remedies against the corporation. Thus in Merchants' etc. Agency vs. Davidson, 23 Cal. App. 274, 137 Pac. 1091 and on page 1092, it is stated:

"It seems to be the general rule that a creditor's claim must be reduced to judgment and execution thereon issued and returned unsatis-

> fied before he can invoke the aid of equity in enforcing collection. Cook on Corporations, Sec. 200; Pomeroy's Eq. Jur., Sec. 1415. That one adopting such course has exhausted his legal remedies admits of no doubt."

In the Idaho cases in which creditors have attempted to enforce stockholders' liability on this or any theory they have first reduced their claims to judgment. See:

Feehan vs. Kendrick, 32 Ida. 220, 179 Pac. 507.

Jensen vs. Aikman, 32 Ida. 261, 181 Pac. 525.

This limitation on the doctrine is based upon the necessity that the claim should first be liquidated and that any defense the corporation may have must first be determined at law where there is a right to a jury trial. In order to sustain the complaint here the Court would have to hear proof upon and determine the validity of every claim against the company and the action being in equity, the corporation would be denied a jury trial on such question, while the creditors, not being before the Court, could not be heard at all.

We submit, however, that as the diligence of learned counsel for appellant has failed to discover a single case to justify the extension of this doctrine so as to allow a stockholder to recover because there is a possibility that creditors of the corporation will be unpaid, the Trial Court was justified in dismissing the bill for want of equity.

ESTOPPEL AND LACHES

In the discussion thus far we have assumed that appellant is in no worse position than the corporation would be if it brought the action. But in view of his own allegations, how can it be said that he is not estopped or that he is not prevented from maintaining this action by the equitable doctrine of laches and stale claims? His bill of complaint shows that he owns from 266 to 304 shares of stock issued under exactly the same circumstances as that of appellee, or in other words, that either appellant or his predecessors in ownership of the stock upon which he bases his right of action participated in the transactions complained of.

In 5 Fletcher Cyclopedia Corporations, at page 5913, the author states:

> "When a corporation has issued its stock as full paid, without receiving its par value in money or property, the transaction cannot be assailed by stockholders who participated, consented or acquiesced. They are estopped. And a stockholder who does not object within a reasonable time, when he has knowledge of the transaction, will be deemed to have acquiesced, but the assent must not have been induced by fraud or have been on an unfulfilled condition."

Numerous cases are cited in support of this text.

In Cunningham vs. Holley, etc. Co., 58 C. C. A. 140, 121 Fed. 720, at page 721 the Court said:

> "It is alleged in the answer, however, that the plaintiff in error was a party to the agree-

ment by which the property and money so subscribed were taken and accepted in full payment of all the capital stock and the shares were issued as paid up and non-assessable. A party to such an agreement cannot as against other stockholders with whom he agreed and contracted assert the invalidity of the transaction."

Other cases so holding are:

Re Charles Town L. & P. Co., 199 Fed. 846.

Washburn vs. National Wall Paper Co., 26 C. C. A. 312, 81 Fed. 17.

Green vs. Abietine Co., 96 Cal. 322, 31 Pac. 100.

Eggleston vs. Pantages, 93 Wash. 221, 160 Pac. 425.

In Taylor vs. South and North Alabama Ry Co., 13 Fed. 152, it was held that failure to object within a reasonable time amounted to consent and estopped the stockholders from afterwards raising the question that the stock was not fully paid for. See also Kent vs. Quicksilver Co., 78 N. Y. 159-191.

In the case at bar over eight years elapsed between the original transaction and the filing of this suit, and from three to six years between the second transaction and the filing of this suit. Hence, the presumption of assent would clearly seem to apply.

It is true that appellant alleges that these transactions both occurred without his knowledge or consent, but he does not show that he owned any specific amount of stock at the time which he still holds, or

that he has at the present time any stock which was not issued as a result of one or the other of these transactions. If he was not a stockholder at the time his knowledge or consent would be immaterial, and if, as we must assume the case to be upon the allegations of the bill, his 304 shares were transferred to him and the original holders of such stock participated in the transaction, appellant is clearly bound by the rule of estoppel.

In 5 Fletcher Cyclopedia Corporations, page 5915, the author states:

> "A transferee of stock in a corporation occupies the same position as his transferrer with respect to the right to complain of an issue of watered or fictitiously paid up stock, and is therefore estopped to complain if his transferrer was estopped. This is true, whether he is a transferee of shares of the watered stock, or a transferee of shares of other stock, which was held by a participating or consenting stockholder; and it is true notwithstanding the fact that he purchased the stock in good faith and in ignorance of the fraudulent or unlawful issue."

In Church vs. Citizens Street Ry. Co., 78 Fed. 526, at page 530, the basis of this rule is well stated in the following language:

> "It is further objected that the plaintiffs in this case, having become purchasers of the stock, although they were good-faith purchasers of it, took it and hold it by no better or different title

than the transferrer of it to them. It is clear that the shares of stock in a corporation are not governed by the law merchant, nor are they governed by the statute of this state touching bills of exchange and notes made payable in a bank in this state. * * * But stocks are mere choses in action, governed by the principles of the common law, and by the common law such choses in action are no better or higher evidence of title or right in the hands of an assignee than they were in the hands of the assignor. That is the general rule—a rule that, in my judgment, is applicable to this case—and, without a reference to the adjudications that have been read to the Court, the Court would have reached the same conclusion by the application of the general principles of law with which the members of the bar as well as the Court are familiar. So that in this case I see no principle of the law that would authorize the plaintiffs to maintain the present bill on the ground that the stock that they had purchased, by the transfer or assignment of it, had acquired some new rights or equities that the stock did not possess in the hands of the transferror or assignor. And this view seems to be supported by the authorities that have been read, which are in harmony with the understanding that the Court has of the principles involved in this sort of contracts."

See also: Brown vs. Duluth etc. Ry. Co., 53 Fed. 889.

Regardless of the application of the rule of estoppel, appellant is prevented from maintaining this action by the doctrine of laches and stale claims. The bill shows on its face that the first transaction complained of occurred over eight years prior to filing suit and nearly eleven years before the hearing, while the second transaction, so far as appellee is concerned, occurred nearly six years before filing the suit and no excuse whatever is offered for the delay. The Idaho Statutes of Limitations which would apply if this were an action at law are as follows:

> Sec. 6607. "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:
>
> Sec. 6610. "Within four years: An action upon a contract, obligation or liability not founded upon an instrument or writing."

The other provisions of the statute are set forth at length in the appendix, but none of them would seem to apply to the present case. The action is certainly not founded upon a written instrument, and if Section 6610 does not apply, Section 6617, which also prescribes a four-year limitation, would control. The Idaho Supreme Court has held that Section 6630 of the Compiled Statutes, which was Section 4077 of the Revised Codes, does not apply to such an action. See Feehan vs. Kendrick, 32 Ida. 220, 179 Pac. 507.

This action, however, being an equity action, the Court will follow the prescribed Statute of Limita-

tions by analogy, and it appearing that the alleged cause of action would be barred under such statute, it is incumbent upon appellant to allege definitely the facts which justify or excuse his delay in instituting suit.

The rule on this subject as applied in the Federal Courts is thus stated in 21 Corpus Juris, page 401, as follows:

> "Where on the face of the bill it appears that there has been unreasonable delay in instituting the suit so that apparently plaintiff has been guilty of laches, the bill must by specific averment account for and excuse the delay."

In Smith vs. Smith, 224 Fed. 1, at page 6, this Court quotes with approval a decision from the Eighth Circuit and clearly lays down the rule which we think is applicable here, using the following language:

> "While the Court below, sitting as a Court of Equity, was not bound by the state statute of limitations, it was proper for it to follow that statute, unless facts were shown which rendered its application inequitable. In Kelley vs. Boettcher, 85 Fed. 55, 62, 29 C. C. A. 14, Judge Sanborn said:
>
> " 'The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make

it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. * * * When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case.'

"That doctrine has been applied in numerous cases. Broatch vs. Boysen, 175 Fed. 702, 99 C. C. A. 278; Boynton vs. Haggart, 120 Fed. 819, 57 C. C. A. 301; Cunningham vs. Pettigrew, 169 Fed. 335, 94 C. C. A. 457; and Brun vs. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154."

See also:

Newberry vs. Wilkinson, 118 C. C. A. 111, 199 Fed. 673.

Mackall vs. Casilear, 137 U. S. 556, 34 L. Ed. 776.

Wyman vs. Bowman, 62 C. C. A. 169, 127 Fed. 257.

Badger vs. Badger, 2 Wall. 95, 17 L. Ed. 338.
Richards vs. Mackall, 124 U. S. 183, 31 L. Ed. 396.

While the precise date on which appellee Avey is claimed to have purchased stock at twenty-five cents on the dollar is not alleged, it does appear that 662 shares of stock were so sold between March, 1912, and September, 1915, and it cannot be presumed in support of the bill that appellee's stock was acquired less than four years before filing the suit in the summer of 1918. And accordingly the doctrine of laches was properly applied by the Trial Court and the action held to be barred.

In conclusion we call attention to the fact that the case of H. C. Anderson, appellant, vs. M. F. Albert, et al., appellees, No. 3613, presents exactly the same questions upon a practically identical record, and it has been stipulated that the decision in that case may follow the decision in this case. Accordingly, we submit that the judgment of dismissal in both cases should be affirmed.

Respectfully submitted,

RICHARDS & HAGA,

Solicitors for Appellee O. H. Avey.

APPENDIX

Sections of Idaho Compiled Statutes referred to in the above brief:

SEC. 4728. *Personal Liability of Stockholders.* Each stockholder of a corporation is individually and personally liable for its debts and liabilities to the full amount unpaid upon the par or face value of the stock or shares owned by him.

Any creditor of the corporation may institute actions against any of its stockholders jointly or severally, and in such action the Court must determine the amount unpaid upon the stock held or owned by each defendant, and a several judgment must be entered against him for a sum not exceeding such amount.

Nothing in this title must be construed to render any stockholder individually or personally liable, as such stockholder, for debts or liabilities of the corporation, either at the suit of a creditor or for assessments or calls, to an amount exceeding the balance unpaid upon his stock or the difference between the amount that has been actually paid upon his stock and the par or face value thereof, except when so liable on the ground of fraud or misrepresentation, or concealment, or for neglect or misconduct as an officer, agent, stockholder or member of the corporation.

No corporation shall issue any stock as paid up, in whole or in part, or credit any amount, assess-

ment or call as paid upon any of its stock, except for money, property, labor or services, actually received by the corporation, or actually paid upon the indebtedness of the corporation, as provided in this section, to the full value of the amounts credited upon such stock.

If any stockholder of any insolvent corporation pays the full amount unpaid upon the stock held by him as above defined, upon the overdue debts of the corporation, incurred while he was such stockholder, he is relieved from any further personal liability upon his stock, but not from any liability for fraud, neglect or misconduct. The liability of such stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred by the corporation, and such liability is not released or discharged by any subsequent transfer of stock.

When such liability does not arise upon contract, it shall be deemed to be incurred when judgment thereof is obtained against the corporation.

The term "stockholders", as used in this section, applies not only to such person as appears by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another; and also to every person who has advanced the instalments or purchase money, or subscribed for stock in the name of a minor, so long as the latter remains a minor; and also to every guardian or trustee who voluntarily invests any trust funds in the stock. Trust funds

in the hands of a guardian or trustee are not liable under the provisions of this section, by reason of any such investment, nor is the person for whose benefit such investment is made responsible in respect to the stock until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment continues until that period, or while the investment continues. Stock held as collateral security, or by a trustee who is not the beneficial owner, or in any other representative capacity without beneficial interest, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with the debts or liabilities of the corporation; but the pledger or person or estate represented is to be deemed the stockholder as respects such liability.

Members of corporations not organized for profit and having no capital stock are not individually or personally liable for its debts or liabilities, unless such liability is imposed by the by-laws of the corporation, and then only to the extent so imposed; any such liability may be enforced to the extent imposed by the by-laws by joint or several actions against members, as before provided.

The liability of each stockholder of a corporation not formed under the laws of this state, but doing business within the state, is the same as the liability of stockholders or corporations organized under the laws of this state.

SEC. 4729. *Issuance of Certificates.* All corpora-

tions for profit must issue certificates for stock when fully paid up, signed by the president and secretary, or such other officers as may be authorized by the by-laws of the corporation, and all such corporations may provide in their by-laws for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide.

SEC. 4733. *Directors May Levy Assessments.* The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent, herein provided.

SEC. 4734. *Limitation on Assessments.* No one assessment must exceed 10 per cent of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided as follows:

1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount.

2. The directors of railroad corporations may assess the capital stock in instalments of not more than 10 per centum per month, unless in the articles of incorporation it is otherwise provided.

3. The directors of fire insurance corporations may assess such a percentage of the capital stock as they deem proper.

SEC. 4735. *Same: Previous Uncollected Assessment.* No assessment must be levied while any portion of a previous one remains unpaid unless:

1. The power of the corporation has been exercised in accordance with the provisions of this title for the purpose of collecting such previous assessment.

2. The collection of the previous assessment has been enjoined, or

3. The assessment falls within the provisions of one of the subdivisions of the last preceding section.

SEC. 4736. *Order Levying Assessment.* The order levying an assessment must specify the amount thereof, when, to whom and where payable; fix the day subsequent to the full term of publication of the assessment notice, on which the unpaid assessments will be delinquent, not less than 30 or more than 60 days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than 15 nor more than 60 days from the day the stock is declared delinquent.

SEC. 4737. *Notice of Assessment.* Upon making of the order the secretary must cause to be published and mailed to each stockholder at his last known place of residence a notice thereof, in the following form:

(Name of corporation in full. Location of principal place of business.) Notice is hereby given that

at a meeting of the directors held on the (date), an assessment of (amount) per share was levied upon the capital stock of the corporation, payable (when, to whom and where). Any stock upon which this assessment remains unpaid on the (day fixed) will be delinquent and advertised for sale at public auction, and unless payment is made before, will be sold on the (day appointed) to pay the delinquent assessment, together with costs of advertising and expenses of sale. (Signature of secretary with location of office.)

SEC. 4738. *Same*: *Publication.* The notice must be published once a week, for four successive weeks, in some newspaper of general circulation published at the place designated in the articles of incorporation as the principal place of business, and also in some newspaper published in the county in which the works of the corporation are situated, if situated in a different county and a paper be published therein. If there be no newspaper published in the place designated as the principal place of business of the corporation, then the publication must be made in some other newspaper of the county, if there be one, and if there be none, then in a newspaper published at the capital of the state.

SEC. 4739. *Delinquent Notice.* If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published in the same papers in which the notice

heretofore provided for was published, a notice substantially in the following form:

(Name in full. Location of principal place of business.) Notice—There is delinquent upon the following described stock on account of assessment levied on the (date), (and assessments previous thereto, if any), the several amounts set opposite the names of the respective shareholders as follows: (Names, number of certificate, number of shares, amount.) And in accordance with law, so many shares of each parcel of such stock as may be necessary will be sold at the (particular place), on the (date), at (the hour) of such day, to pay delinquent assessments thereon, together with the cost of advertising and expenses of the sale. (Name of secretary, with location of office.)

SEC. 4740. *Same*: *Additional Rrequirements.* The notice must specify every certificate of stock, the number of shares it represents and the amount due thereon, except when certificates may not have been issued to parties entitled thereto, in which case the number of shares and amount due thereon must be stated.

SEC. 4741. *Same*: *Publication.* The notice, when published in a daily paper, must be published for 10 days, excluding Sundays and legal holidays, previous to the day of sale. When published in a weekly paper it must be published in each issue for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least 15 days prior to the day of sale.

SEC. 4742. *Delinquent Stock May Be Sold.* By the publication of the notice the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale, upon which any portion of the assessment or costs of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessment due and costs of advertising and sale.

SEC. 4743. *Conduct of Sale.* On the day, at the place, and at the time, appointed in the notice of sale, the secretary must, unless otherwise ordered by the board of directors, sell, or cause to be sold, at public auction to the highest bidder, for cash, so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon, according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising in addition to the assessment.

SEC. 4744. *Purchaser.* The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of a share, is the highest bidder, and the stock purchased must be transferred to him on the stock books of the corporation on payment of the assessment and costs.

SEC. 4745. *Corporation May Purchase.* If at the sale of stock no bidder offers the amount of the assessment and costs and charges due, the same may be bid in and purchased by the corporation, through the secretary, president or any director thereof, at the

amount of the assessment, charges and costs due; and said amount must be credited as paid in full on the books of the corporation, and entry of the transfer of the stock to the corporation made. While the stock remains the property of the corporation it is not assessable, nor must any dividend be declared thereon, but all assessments and dividends must be apportioned upon the stock held by the stockholders of the corporation.

SEC. 4746. *Same: Effect of Purchase.* All purchases of its own stock made by any corporation, vest the legal title to the same in the corporation, and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, on vote of a majority of all the remaining shares: *Provided*, That when the by-laws so provided, the board of directors may allow a redemption of the stock so sold upon payment of the sum for which the same was sold, together with all subsequent assessments which may be due thereon, and interest on such sums from the time they were due. Whenever any portion of the capital stock of a corporation is held by the corporation, it shall not be voted, but a majority of the remaining shares is a majority of the stock for all purposes of election or voting.

SEC. 4747. *Postponement of Sale.* The dates fixed in any notice of assessment or notice of delinquent sale, published as aforesaid, may be extended from time to time for not more than 30 days, by order of the directors, entered on the records of the corpora-

tion; but no such order is effectual unless notice of such extension or postponement is appended to, and published with, the notice to which the order relates.

SEC. 4748. *Defective Proceedings.* No assessment is invalidated by a failure to make publication of the notices, nor by the non-performance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of assessment, are void, and publication must begin anew.

SEC. 4749. *Actions to Recover Stock Sold.* No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect in the notice of sale or in its publication, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid or may be due thereon, and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced within six months after such sale was made.

SEC. 4750. *Proof of Publication.* The publication of notice required by this title may be proved by the affidavit of the printer, publisher, foreman or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or auctioneer is *prima facie* evidence of the time and

place of sale, of the quality and particular description of the stock sold, and to whom, and for what price, and of the fact of the purchase money being paid. Such affidavit must be filed in the office of the corporation, and copies of the same, certified by the secretary thereof, are *prima facie* evidence of the facts therein stated. Certificates of files and records of the corporation in his office, signed by the secretary, and under the seal of the corporation, are *prima facie* evidence of their contents.

SEC. 4751. *Collection of Call by Action.* On the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale, the board of directors may elect to waive further proceedings by sale, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof.

SEC. 6607. *Limitation of Actions.* The periods prescribed for the commencement of actions other than for the recovery of real property are as follows.

SEC. 6609. *Action on Written Contract.* Within five years: An action upon any contract, obligation or liability founded upon an instrument in writing.

SEC. 6610. *Action on Oral Contract.* Within four years: An action upon a contract, obligation or liability not founded upon an instrument of writing.

SEC. 6611. *Statutory Liabilities, Trespass, Trover, Replevin and Fraud.* Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

2. An action for trespass upon real property.

3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

SEC. 6617. *Actions for Other Relief.* An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

SEC. 6630. *Actions Against Directors and Stockholders.* This chapter does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.